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IN THE

Supreme Court of the United States

October Term, 1963
No. 553

HARRY FINCH and JAMES THIELE,
Petitioners,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,
Respondent.

On Petition for Writ of Certiorari.

RESPONDENT'S OPPOSING BRIEF.

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RESPONDENT'S OPPOSING BRIEF.

Opinion Below.

On May 21, 1963, the California District Court of Appeal, Second Appellate District, Division Three, rendered its opinion unanimously affirming petitioners' conviction in the Superior Court of Los Angeles County of conspiracy to ask for and receive and agree to receive bribes and extort money, and to solicit such activity. The opinion is reported in 210 A. C. A. 495; 30 Cal. Rptr. 901. The California Supreme Court denied a hearing in the case July 17, 1963. None of the Justices voted in favor of a hearing. (60 A. C. No. 2, Minutes.)

Jurisdictional Statement.

The jurisdictional ground is set forth in the Petition (p. 2): *i.e.*, 28 U. S. C. §1257(3).

Constitutional and Statutory Provisions Involved.

The state constitutional provision and statutes involved are set forth in the Petition (p. 3), *i.e.*, California Constitution, Article I, §13, and California Penal Code, §§688 and 1323. Pertinent portions of these are set forth in Appendix B of the Petition. The federal constitutional provisions involved are the Fifth Amendment to the United States Constitution ("No person . . . shall be compelled in any criminal case to be a witness against himself . . . .") and the Fourteenth Amendment (". . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . . .") (Pet., p. 2.)

Questions Presented.

The questions presented by petitioners are, essentially, whether they were denied due process because the Deputy District Attorney was permitted to question a defense witness who was not himself a defendant and to comment by way of impeachment relative to the witness's claim of the privilege against self-incrimination before the Grand Jury, and whether the privilege against self-incrimination in the Fifth Amendment to the United States Constitution should apply to the state courts. Respondent submits that a further question arises: whether the judgment may be sustained on a non-federal ground.

Statement of the Case.

For a factual statement of the case, respondent incorporates by reference matter appearing in *People v. Finch*, *supra*, 216 A. C. A. 495, 498-501, 502, 504-506, 30 Cal. Rptr. 901, 903-905, 906, 907-909. In short, the evidence discloses that petitioners, who were detective inspectors for the Long Beach Police Department, sought to enlist two patrolmen, Jordan and Henry, in "shaking down" Dr. Garland under the threat of arresting him for abortion. The doctor was to pay $400 a month to be split five ways among the four officers and Captain Martin, the superior of petitioners. Jordan and Henry reported the matter to Lieutenant Black. At Black's instructions, and those of other officers, Jordan and Henry pretended to "play along" with petitioners, to obtain evidence. Jordan and Henry also took Dr. Garland into their confidence and he too "played along." A number of transactions ensued involving the ostensible payment by Dr. Garland of bribes. The new chief of police was advised of the situation and he and Lieutenant Black secured the cooperation of members of the Sheriff's force and District Attorney's Office. Incriminating evidence was obtained through the help of the Sheriff's force and in due course petitioners were arrested. They did not deny various of the matters in question, but claimed that the bribe-solicitors were in reality Jordan and Henry, and that they, petitioners, were "playing along" to get evidence. According to petitioners, they apprised Captain Martin of the matter and "played along" at his in-

structions. Captain Martin, however, did not carry the matter further; he did not contact higher authority.

After petitioners' arrest, the Grand Jury undertook an investigation of their activities. Captain Martin was summoned to appear in connection with that investigation. He did appear, and was called as a witness. He declined to testify on the ground of self-incrimination and the advice of his attorney. At the trial, however, he testified extensively as a defense witness, placing his and petitioners' activities in an innocent light. He was not named as a defendant in the proceedings. Captain Martin acknowledged that he responded to various questions put to him at the Grand Jury hearing by stating that his attorney had advised him he should decline to answer on the ground it might tend to incriminate or degrade him, and that this was his personal wish. Yet Captain Martin stated at the trial, that by those answers (to the effect that he declined to answer on the ground it might tend to incriminate or degrade him) he did not mean to convey to the Grand Jury that his answers if truthfully given would have tended to incriminate or degrade him! [Pet. App. C, pp. 6c-8c; Rep. Tr. pp. 3800-3806.]

As before noted, petitioners' conviction of conspiracy to ask for and receive and agree to receive bribes and extort money, and to solicit such activity, was affirmed on appeal. They complain essentially of the permission extended the People to examine Captain Martin at the trial relative to his refusal to testify before the Grand

Jury, and they also complain of the Deputy District Attorney's comments on this refusal in argument to the jury, directed toward impeachment of Martin's credibility as a witness.

(As reflected in *People v. Finch, supra*, 216 A.C.A. 495, 500, fn. 1, 30 Cal. Rptr. 901, 905, fn. 1, an objection by the defense to the proposed questioning was overruled, in view of which ruling defense counsel initiated the questioning.)

Summary of Argument.

The judgment rests on ample non-federal grounds. State procedure was followed at the trial within the permissible scope of such procedure; due process was not violated. In any event, the Fifth-Amendment privilege against self-incrimination should not be made applicable to the states through the Fourteenth Amendment to the United States Constitution. If, however, it is concluded that it should be made applicable, the judgment in the case at bar should stand since no fundamental unfairness has been demonstrated.

ARGUMENT.

I.

The Judgment Rests on Adequate Non-Federal Grounds.

Although petitioners urge that a constitutional issue is involved herein, we respectfully submit that the judgment rests on ample state grounds. It is well settled that a federal issue will not be reviewed if the judgment can be affirmed on the basis of a non-federal ground, *e.g.*, the exercise by a state court of state procedure properly vested in the state courts. (*Herb v. Pitcairn*, 324 U. S. 117, 125-126, 65 S. Ct. 459, 463; *Flournoy v. Wiener*, 321 U. S. 253, 262, 64 S. Ct. 548, 552-553; *Minnesota v. National Tea Company*, 309 U. S. 551, 554, 60 S. Ct. 676, 678.)

Questions pertaining to the admissibility of evidence generally fall within the category of the exercise by a state court of state procedure. (*Hughes v. Heinze*, 268 F. 2d 864, 866 (9th Cir.).)

At the trial in the Superior Court, both petitioners testified in the course of cross-examination that Captain Martin declined to testify before the Grand Jury and one of the petitioners acknowledged that Captain Martin's refusal was based on the privilege against self-incrimination. [Pet. App. C, pp. 1c-2c; Rep. Tr. pp. 3003-3005, 3579-3580.] This testimony was received without any objection whatsoever. It is the time honored rule in California that evidence which might otherwise be incompetent becomes competent when it is received without objection. (*People v. Mjlham*, 42 Cal. 2d 524, 526, 528, 267 P. 2d 1039, 1040, 1042; *People v. Close*, 154 Cal. App. 2d 545, 552, 316 P. 2d 1019, 1024.)

Accordingly, the fact of Captain Martin's having had an opportunity to testify before the Grand Jury and of his having refused to testify because of the privilege against self-incrimination was now before the jury in accordance with state procedure, at the time Captain Martin took the stand as a defense witness at the trial. His taking the stand and testifying as he did at the trial was inconsistent with his previous action.[1]

This inconsistency as it tended to impeach his credibility as a witness was the subject of comment by the Deputy District Attorney in the course of argument to the jury, as petitioners have noted. [Pet., App. C, pp. 11c-23c; Rep. Tr. pp. 4430-4437, 4449-4451, 4462-4467, 4849-4852, 4873-4880.] However, the comments were spoken by the deputy without any objection being interposed whatsoever. It would seem that if the defense felt the comments were at all undue or excessive, some sort of objection would have been interposed and the trial court would have been given an opportunity to take appropriate action. The failure to object to argument is akin to the failure to object to evidence. In California, a defendant may not complain on appeal of assertedly improper argument where the trial court could have alleviated the situation had an objection been interposed. *People v. Chavez*, 50 Cal. 2d 778, 793.

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[1] Unlike the defendant in *Grunewald v. United States*, 353 U. S. 391, 422, 77 S. Ct. 963, 983, stressed by petitioners, Captain Martin apparently did not reiterate his innocence before the Grand Jury. [Pet., App. C, pp. 11c-23c.] Nor does it appear that the defendant in *Grunewald* made such a self-impeaching acknowledgement as Captain Martin, that he (Martin) told the Grand Jury it was his wish not to answer questions on the ground such action might tend to incriminate him, but nevertheless he had not wished to answer to that body what truthful answers would have tended to incriminate him. [Rep. Tr. pp. 3803-3806.]

329 P. 2d 907, 910; *People v. Codina*, 30 Cal. 2d 350, 362, 181 P. 2d 881, 888.)

It bears emphasis that the questioning and remarks of which complaint has been made herein consumed a relatively small portion of the Reporter's Transcript containing in the neighborhood of 5,000 pages.

Thus, we strongly urge that petitioners' arguments dissolve in the face of ample non-federal grounds on which to sustain the judgment.

As the District Court of Appeal stated in its opinion (*People v. Finch*, *supra*, 216 A. C. A. 495, 500-501, 30 Cal. Rptr. 901, 905):

> "It appears that the court considered the fact of Martin's refusal to testify before the grand jurs on the ground of self-incrimination to be admissible for the purpose of impeachment. The court relied upon People v. Kynette, 15 Cal.2d 731 [104 P.2d 794] and People v. Wayne, 41 Cal.2d 814 [264 P.2d 547], as authority for the admission of the evidence of Martin for impeachment purposes. Defendants urge that the holding in Kynette and Wayne that the refusal of a witness to testify upon a former occasion upon the ground of self-incrimination is admissible as impeaching evidence was overruled in People v. Calhoun, 50 Cal.2d 137 [323 P.2d 427] and People v. Snyder, 50 Cal.2d 190 [324 P.2d 1]. The People reply that the latter cases held only that evidence of a former refusal to testify is inadmissible and not to be considered as indicating a consciousness of guilt or as a basis for a finding of guilt, and that

it was error to permit its consideration for those purposes. It is unnecessary for us to consider this point. Even if it was error to permit the questioned cross-examination of Martin defendants suffered no prejudice therefrom. Before Martin was examined Thiele was asked on cross-examination: 'Q. As a matter of fact, you know he [Martin] appeared before the Grand Jury and refused to testify, don't you?' and he answered: 'I do know that, yes, sir.' Finch was questioned on cross-examination as follows: 'Did you ask him what he had said before the Grand Jury? A. He told me why he didn't testify. Q. He told you that he had refused to testify on the ground of self-incrimination, didn't he? A. No, he didn't. Q. Now, at some time you did learn that it was a fact, though, didn't you? A. Yes.' There was no objection to this interrogation.

"By this testimony the jury was unequivocally made acquainted with the fact that Martin had refused to testify before the grand jury upon the ground of self-incrimination, and the only fact that was added in the examination of Martin was that in refusing to testify he was acting upon the advice of his attorney. If any prejudice resulted it was from the testimony of the defendants, to which no objection was made. The claim of prejudice cannot be sustained."

In other words, no fundamental unfairness appears and due process was not violated. *Uveseba v. California*, 314 U. S. 219, 230, 62 S. Ct. 280, 286. The judgment may be upheld on non-federal grounds.

II.

The Fifth Amendment Privilege Should Not Be Made Applicable to the States, but in Any Event Its Application Should Not Invalidate the Judgment Herein.

Assuming that a federal question should be deemed presented, it is respondent's position first that the Fifth Amendment privilege against self-incrimination should not be made applicable to the states through the due process clause of the Fourteenth Amendment, and that *Twining v. New Jersey*, 211 U. S. 78, 29 S. Ct. 14, and *Adamson v. California*, 332 U. S. 46, 67 S. Ct. 1672, should stand. While the factual situation in *Adamson* was different from that in the case at bar, we submit that the following conclusion in *Adamson* is an efficacious one: that a state may control the situation "in accordance with its own ideas of the most efficient administration of criminal justice . . . ." (*Adamson v. California*, *supra*, 332 U. S. 46, 57.)

It bears emphasis that within the relatively recent past *Twining* and *Adamson* were reaffirmed in *Cohen v. Hurley*, 366 U. S. 117, 127-129, 81 S. Ct. 954, 960-961.

In respondent's view, the historical record does not require this Honorable Court to hold that the Fifth Amendment privilege against self-incrimination was incorporated into the Fourteenth Amendment by virtue of the latter's adoption. (See *Fairman*, "Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding," 2 Stanford L.Rev. 5-139.) Nor does respondent believe that such departure from existing law is compelled by relatively recent decisions of this Court on other topics, *e.g.*, confessions

and searches and seizures stressed by petitioners. Surely the essence of the confession cases is that a state may not utilize an extrajudicial confession procured by inhumane methods. (See *Haynes v. Washington*, 373 U. S. 503, 83 S. Ct. 1336.) And surely it is the essence of the search and seizure cases that a state may not use evidence secured through unrestricted rummaging by the police, in the absence of consent or probable cause to arrest. (See *Ker v. California*, 374 U. S. 23, 83 S. Ct. 1623.) We submit that these cases do not add weight to the argument that *Twining*, *Adamson* and *Cohen* should be overruled.

Petitioner also stress *Chicago B. and Q. R. Co. v. Chicago*, 166 U. S. 226, 234-241, 17 S. Ct. 581, 584-586. They indicate that this case applied a portion of the Fifth Amendment (regarding the taking of property) to the states through the Fourteenth Amendment. We do not believe that this was the rationale of the opinion, but rather that the direct language of the Fourteenth Amendment applied. Hence, this case does not lend weight to the foregoing argument.

If, however, it is concluded that the Fifth Amendment privilege should apply to the states, questions arise as to the limits of its application. California Constitution, Article I, §13, provides similarly to the Fifth Amendment that no person in any criminal case shall be compelled to be a witness against himself. This provision is buttressed by Penal Code §§688 and 1323. The California Supreme Court in *People v. Snyder*, 50 Cal. 2d 190, 196-197, 324 P. 2d 1, 5-6 and *People v. Calhoun*, 50 Cal. 2d 137, 147, 323 P. 2d 427, 433-434, concluded that no implication of guilt could be drawn from a defendant's having refused to testify before the Grand Jury (or in another trial) on

the ground of self-incrimination. *Calhoun* and *Snyder* do not appear to have overruled earlier California decisions, *People v. Wayne*, 41 Cal. 2d 814, 829-830, 264 P. 2d 547, 555, and *People v. Kynette*, 15 Cal. 2d 731, 749-750, 104 P. 2d 794, 804, holding that a witness's claim of privilege before the Grand Jury may be used at the trial for impeachment purposes. This was what was done in the case at bar. Captain Martin was not a defendant in the action but merely a witness, and the questioning and comment relative to impeachment were in accord with state procedure under the state constitution and statutes. If application of the Fifth Amendment privilege to the states should invalidate such use of a witness's claim of privilege for impeachment purposes,[2] we nevertheless still submit that in view of the matters presented in Point I, above, no fundamental unfairness resulted in the trial which would constitute an infringement of due process (*Lisenba v. California, supra*, 314 U. S. 219, 236), and consequently the judgment should stand.

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[2] A basis for not invalidating California's use of a witness's claim of privilege before the Grand Jury for purposes of impeachment at the trial is found in the following circumstance: Under federal law a defendant in a criminal case is incompetent to testify at the trial or certain other proceedings not herein pertinent unless he waives his incompetency. ". . . [T]he person charged shall, at his own request, be a competent witness. . . ." (18 U. S. C. § 3481.) California goes further and extends the rule to grand jury proceedings. Penal Code section 1323.5 provides that "In the trial of or examination upon all indictments, complaints and other proceedings before any court, magistrate, grand jury, or other tribunal, against persons accused or charged with the commission of crimes or offenses, the person accused or charged shall, at his own request, but not otherwise, be deemed a competent witness. . . ." Thus, a person within the appropriate category need not be subject to impeachment at the trial.

Conclusion.

Respondent submits that an examination of the record, in light of the District Court of Appeal's opinion, discloses the absence of any substantial federal question. It is therefore requested that the petition for writ of certiorari be denied.

Respectfully submitted,

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